



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE

Office: Denver

Date:

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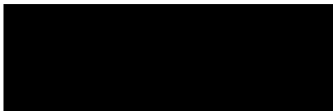
IN RE: Applicant:



APPLICATION:

Application for Certificate of Citizenship under § 341(a) of the
Immigration and Nationality Act, 8 U.S.C. 1452(a)

IN BEHALF OF APPLICANT:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

Identification data deleted to
prevent clearly unwarranted
invasion of personal privacy

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Denver, Colorado, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on March 18, 1959 in Mexico and was lawfully admitted for permanent residence in September 1987. The applicant's father, [REDACTED] was born in Arizona in November 1917. The applicant's mother, [REDACTED], was born in 1931 in Mexico and never had a claim to United States citizenship. The applicant's parents married each other on March 10, 1969. The applicant claims that he acquired United States citizenship through his father as a child legitimated before the age of 18 years under the law of the father's domicile under § 309 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1409.

The district director noted that the applicant's father was ordered excluded from the United States on April 9, 1954 under former § 212(a)(20) of the Act, 8 U.S.C. 1182(a)(2), as an immigrant not in possession of a valid visa or lieu document.

The record reflects that the immigration judge determined that the applicant's father has lost his United States citizenship under § 349(a)(4)(A) of the Act, 8 U.S.C. 1481(a)(4)(A), for having accepted, served in, or performed the duties of any office, post or employment under the government of a foreign state or a political division thereof, after attaining the age of 18 years if he has or acquires the nationality of such foreign state. The record reflects that the applicant's father was a national of Mexico by virtue of Article 30 of the Constitution of Mexico and was employed by the government of Mexico from January 29, 1953 until April 1953.

The district director determined that the applicant's father was not a United States citizen at the time of the applicant's birth. The district director further determined, based on the sworn statement by the applicant's father on December 23, 1953 that he returned to Mexico at the age of 9 years and thereafter lived in Mexico, the record failed to establish that the applicant's father had been physically present in the United States or one of its outlying possessions for 10 years, at least 5 of which were after age 14, at the time of the applicant's birth. The district director then denied the application accordingly

On appeal, counsel states that the Service erred in denying the application and failed to grant the applicant additional time in which to present additional documentation.

Montana v. Kennedy, 278 F.2d 68, affd. 366 U.S. 308 (1961), held that to determine whether a person acquired U.S. citizenship at birth abroad, resort must be had to the statute in effect at the time of birth. Section 301(g) of the Immigration and Nationality Act was in effect at the time of the applicant's birth. This section specifically requires the applicant to establish that prior to the applicant's birth, the citizen parent must have resided in the United States or in an outlying possession for 10 years, at least 5 of which were after age 14.

Section 309(a) of the Act was amended by Pub. L. 99-653 and was effective as of the date of enactment, November 14, 1986. The old § 309(a) shall apply to any individual who has attained 18 years of age as of the date of the enactment of this Act.

The text of "old § 309(a) of the Act" is as follows:

The provisions of paragraphs (c), (d), (e), and (g) of § 301, and paragraph (2) of § 308, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act [viz., December 24, 1952], if the paternity of such child is established while such child is under the age of 21 years by legitimation.

Section 349 of the Act provides, in pertinent part, that:

(a) A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality-

(1) obtaining naturalization in a foreign state upon his own application or upon an application filed by a duly authorized agent, after having attained the age of 18 years; or

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof, after having attained the age of 18 years; or

(3) entering or serving in, the armed forces of a foreign state if

(A) such armed forces are engaged in hostilities against the United States, or

(B) such persons serve as a commissioned or noncommissioned officer; or

(4) (A) accepting, serving, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of 18 years if he has or acquires the nationality of such foreign state, or

(B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of 18 years for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

(5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(6) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(7) committing any act of treason against, or attempting by force to overthrow, or bearing arms against the United States, violating or conspiring to violate any of the provisions of 18 U.S.C. 2383, or willfully performing any act in violation of 18 U.S.C. 2385, or violating 18 U.S.C. 2384, by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when convicted thereof by a court martial or by a court of competent jurisdiction.

The record reflects that an immigration judge determined that the applicant's father had lost his U.S. citizenship in 1953 and he was ordered excluded and deported from the United States in 1954. That finding has not been overturned. Therefore, the Associate Commissioner is bound by the decision of the immigration judge. Since the applicant's father was not a U.S. citizen when the applicant was born, the applicant could not have acquired United States citizenship at birth. The record also reflects that the applicant's father failed to meet the physical presence requirements at the time of the applicant's birth even if it should be determined later that the father did not lose his U.S. citizenship.

8 C.F.R. 341.2(c) states that the burden of proof shall be on the claimant to establish the claimed citizenship by a preponderance of the evidence. The applicant has not met this burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.